(4)

No. 91-1202

In the
Supreme Court of the United States
October Term, 1991

Ann Richards, Governor of Texas; Selden Hale, III, Mamie Moore Proctor, Hon. Clarence N. Stevenson, Allan B. Polunsky, James M. Eller, F.L.Stephens, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

Johnny Klevenhagen, Harris County Sheriff; John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United State Court of Appeals
For the Fifth Circuit

Respondents' Brief in Opposition

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Questions Presented

As presented by petitioners and to which respondents' brief in opposition is directed:

1. Whether, under principles of federalism and Article III of the Constitution, federal courts have jurisdiction to decide unsettled questions of state law involving a dispute between two levels of state government concerning state fiscal policy and a complex regulatory scheme when resolution of the dispute was not necessary to provide relief to the Plaintiff prisoner class in a local jail?

2. Whether a federal court's order, based solely on state law, that the state must compensate one of its political subdivisions is in violation of the Eleventh Amendment when such order is not necessary to provide relief to the prisoner class in a local jail?

3. Whether, under principles of federalism, federal courts should abstain from deciding, or, alternatively, certify to the Texas Supreme Court, unsettled questions of state law involving a dispute between two levels of state government concerning state fiscal policy and a complex state regulatory scheme, when federal judicial intervention in the dispute is not necessary to provide relief to the Plaintiff prisoner class in a local jail and a state court proceeding involving identical issues and identical parties is pending?

4. Whether state officials who have no supervisory responsibility over local jails can be held liable for unconstitutional conditions in a local jail under *Wilson v. Seiter,* ____ U.S. ____, 111 S.Ct. 2321 (1991) because they (1) did not construct or acquire additional capacity in the state prison system beyond that appropriated for by the state legislature and (2) did not further expedite the release of convicted felons in the state prison system, given a context of unsettled state law on their responsibility (if any) for convicted felons in local jails and federal court orders limiting the use of state prison capacity?

5. Whether, under principals of federalism, a federal district court abuses its discretion in setting a constitutional cap in a local jail at design capacity pursuant to state law and previous consent decrees without adopting a "wait-and-see" approach to determine whether, in operating beyond design capacity, jail officials will be deliberately indifferent to the significant human needs on the inmate class?

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On Petition for Certiorari
To the United State Court of Appeals
For the Fifth Circuit

Respondents' Brief in Opposition

The respondents, a class of inmates within the Harris County, Texas jail system respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case which is reported at 937 F.2d 984 (5th Cir. 1991).

Statement of the Case

Petitioners' statement of the case omits relevant facts and is in some respects inaccurate. Rather then burden the court with another statement, respondents adopt Judge Higginbotham's presentation in *Alberti v. Sheriff of Harris County, Texas,* 937 F.2d 984, 986-992 (5th Cir. 1991) which avoids those deficiencies.

Summary of Argument

Petitioners present five question for review. The first three are directed to the federalism/abstention vortex and have been either rendered moot or have been greatly diminished in importance by virtue of legislation enacted after the circuit court's decision. The relief petitioners sought, resolution of the parties' responsibilities "on the terra firma of Texas Politics in the Texas legislature," has indeed occurred. There are no longer unsettled questions of state law to sustain a controversy.

There is no conflict of opinions between the circuits. The *Alberti* panel easily distinguished the claimed conflicting case on the facts and petitioners have not attempted to explain or dispute the *Alberti* panel's distinction.

Petitioners seek review of a question related to application of the *Wilson v. Seiter* indifference standard; however, this question was not decided by the circuit court, but was instead remanded to the lower court. Thus there is no circuit court opinion to be reviewed on

this issue, and without a decision, of course there can be no conflict with other circuits.

Finally, petitioners seek review of the question: "Whether, under principles of federalism, it is an abuse of discretion in setting a constitutional cap in a local jail at design capacity pursuant to state law and previous consent decrees without adopting a 'wait and see' approach to determine whether, in operating beyond design capacity, jail officials will be deliberately indifferent to the significant human needs of the inmate class." This question is not properly before the Court for review because it was not an issue presented to the court of appeals.

Reasons for Denying the Writ

I. NO IMPORTANT ISSUE OF FEDERAL LAW IS PRESENTED BY THE PETITION.

A. MANY OF THE QUESTIONS PRESENTED BY THE PETITION EITHER ARE MOOT OR ARE OF GREATLY DIMINISHED IMPORTANCE DUE TO ENACTMENT OF LEGISLATION AFTER THE CIRCUIT COURT DECISION

The first question presented is whether "federal courts have jurisdiction to decide unsettled questions of state law involving two levels of state government concerning state fiscal policy and a complex regulatory scheme." Petition for Writ of Certiorari p. i (hereafter, "Petition"). However, petitioners only contend that the law was unsettled prior to August of 1991. Petition p. 6.

That is before the Texas legislature enacted HB 93[1] which clarified the relation of the duties and responsibilities of the state and counties for housing prisoners. Petition pp. 10-11.

Now that these relations have been determined and the previously heated litigation is no longer pending, the importance of this question is greatly diminished and the questions raised in the circuit court have been mooted.

Whatever this court might decide it would not affect the present and future continuing legal status (which has been determined by HB 93) of the parties. At most, it could only be applied to a an earlier relation which is of little or no present importance because there is no longer a state regulatory scheme involved or a significant question of fiscal policy presented. The old scheme, which would be before the court if certiorari were granted, was discarded by HB 93 almost a year ago and the issues raise by the earlier scheme are now moot.

Petitioners' second question presented (whether an order based solely on state law, that the state must compensate one of its political subdivisions) and third three (whether federal courts should abstain from deciding unsettled questions of state law involving a dispute between two levels of state government) suffer a similar infirmity. These questions depend, for their vitality, upon there being unsettled state law. Now that

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[1] Vernon's Tex. Sess. Laws 1991, 2d Called Sess., Ch. 10, pp. 180-226 (hereafter, "HB 93")(Eff. August 29, 1991).

the legislature has acted to delineate the parties duties and liabilities there is no longer the driving force to generate significant controversy.

The importance of this legislative enactment cannot be overstated. Petitioners' opening statement attaches national significance of these questions and highlights the overriding importance of HB 93 by underscoring their basic contention that these matters were not for federal courts but "should only have been resolved on the terra firma of Texas politics in the Texas legislature." (Emphasis supplied). Petition p. 4. But this is exactly what the state has gotten in HB 93 and is precisely why their questions are moot and/or unimportant and inappropriate for certiorari.

Also, under these circumstances, to grant certiorari could unsettle the rules pertaining to mootness, standing, case and controversy, or cause an unnecessary foray by the Court into these areas before petitioners' questions are reached.

B. THERE IS NO CONFLICTING CIRCUIT COURT OPINION

Petitioners assert there is a conflict between the *Alberti* opinion and that of *Kelly v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee v. State of Tennessee,* 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988). However Judge Higginbotham easily distinguished the two cases:

Kelly, cited extensively by the state, is

> distinguishable —the order remedying the violation in *Kelly* ran only against the county, and the state was not a current constitutional violator, yet the county sought reimbursement from the state for the costs of the remedial order.
>
> *Alberti*, 937 F.2d at 1001.

Surprisingly the petitioners fail to address this distinction. While petitioners go to great length asserting the two cases are in conflict, they neither dispute nor explain the panels explicitly distinguishing the two cases on the facts. Surely the petitioners were familiar with the panel decision and would have addressed the point raise by Judge Higginbotham if there were an effective response. Petitioners silence is tantamount to an admission that the distinction is valid and that the cases are materially different on the facts. There is no conflict that requires resolution by this Court.

C. THE *WILSON V. SEITER*-INDIFFERENCE QUESTION WAS REMANDED AND IS NOT BEFORE THE COURT.

Petitioners ask this Court to grant certiorari to consider a fourth question: "Whether state officials who have no supervisory responsibility over local jails can be held liable for unconstitutional conditions in a local jail under *Wilson v. Seiter*, ____ U.S. ____, 111, S.Ct. 2321 (1991) because they (1) did not construct or acquire additional capacity in the state prison system and (2) did not further expedite release of convicted felons given a context of unsettled state law on their responsibility (if

any) for convicted felons in local jails and federal court orders limiting the use of state prison capacity." However, this question was not decided by the circuit court, but was remanded to the trial court for further findings because *Seiter* had been decided between the time the trial court ruled and the appeal was heard. *Alberti*, 937 F.2d at 993 and 1004.

An element in determining whether a question is worthy of certiorari is the finding of conflicting opinions between the circuits. This requirement assures a full development of the issues so that this court will not need to revisit the area due to failure of the briefs and argument to maturely develop all pertinent matters. But here there is not an opinion from the circuit court much less the development of a conflict. Certiorari is an inefficient use of the Court's time when the issue is unseasoned and not ripe for review.

D. WHETHER FEDERALISM REQUIRES A COURT TO IMPLEMENT A REMEDY PIECEMEAL BY "WAIT AND TO SEE" IF JAIL OFFICIALS WILL BE DELIBERATELY INDIFFERENT, WAS NOT AN ISSUE PRESENTED TO THE COURT OF APPEALS AND THEREFORE IS NOT PROPERLY BEFORE THIS COURT

Petitioners' last question for consideration is "whether, under principles of federalism, a federal district court abuses its discretion in setting a constitutional cap in a local jail at design capacity pursuant to state law and previous consent decrees without adopting a "wait-and-see" approach to determine

whether, in operating beyond design capacity, jail officials will be deliberately indifferent to the significant human needs of the inmate class." The question was not presented to the circuit court as is demonstrated by an examination of petitioners' circuit court brief's Statement of Issues.[2] For convenience this statement is set out in

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[2] Statement of Issues in Court of Appeals Brief of State Appellants Ann Richards, The Governor of Texas, Et Al. at p. 1:

STATEMENT OF ISSUES

The issues presented for review are as follows:

1. Whether the lower court had jurisdiction to decide the case:
(a)
. . .
(d)

2. Whether assuming the lower court had jurisdiction it should have abstained from exercising it under principles of federalism?
(a)
. . .
(e)

3. Whether under State and federal law State Defendants are liable?
(a)
. . .
(d)

4. Whether there is procedural error justifying reversal?
(a)
. . .
(e)

5. Whether the *Alberti* court erred as matter [sic] of law in ruling that the constitutional capacity of the Harris County jail is its design capacity and whether there is sufficient evidence to show this?

6. Whether the *Alberti* court violated this Court's decision in *In*

the margin.

It is difficult at best to respond to a question not previously raised,[3] e.g., there has been no record

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Re: Clements, 881 F.2d 145 (5th Cir. 1989) by unilaterally ordering State Defendants to deposit $750,000 in the court registry to defray the cost to Harris Count of transferring prisoners from the Harris County jail to detention facilities in other counties?

7. Whether the *Ruiz* court has under *Clements* or should be given complete control over all remedies against State Defendants including any award of costs, attorneys fees and sanctions (assuming that State Defendants remain in this case after this appeal is decided)?

8. Whether the *Ruiz* court should be given complete control over all population issues relating to the Harris County jail (assuming that State Defendants remain in this case after this appeal is decided)?[1]

[1][Footnote in Original] Issues 6-8 have already been fully briefed in State Defendants' Petition for a Writ of Mandamus, etc.. This Briefing will not be repeated here but is adopted and incorporated by reference herein.

[3] The panel did response to the most analogous question petitioners did raise — whether court erred as matter of law in ruling constitutional capacity is design capacity, No. 5 above — by stating that the lower court's "findings contemplated a number of factors in addition to design capacity —the fact that thousands of inmates were sleeping on the floor, the physical design of the cellblocks, the inability of the staff to control inmates, the increase in disciplinary violations, plumbing problems, poor ventilation, the absence of a sprinkler system or a second means of egress in the event of a fire, supply shortages, insufficient food service, inadequate medical care, and the outbreak of a pneumococcal infection. In sum, then, the finding was not clearly erroneous." *Alberti* 937 F.2d at 1000-1001. Petitioners wrongly characterize this issue as a question of law and not fact. Both the trial court and circuit court treated that question as evidentiary in nature, one which depends on the particular facts of the case.

developed. Such a question surely would not be the meet the thrust of Rule 17.1(a)[4] reasons for granting review. The enumerated provisions therein have a common denominator in that all address a court of appeals decision, whether the opinion be in conflict with one another, with a state court of last resort, or be one which has far departed from the accepted and usual course of judicial proceeding. All these are premised on there being an appeals court decision, but when a question has not been presented below there is not going to be an opinion addressing it — even by silence. Therefore review of such a question should be denied.

II. THERE ARE OTHER SUFFICIENT REASONS FOR THE COURT TO DENY THE PETITION

A. The Lower Courts Reached a Fair and Correct Conclusion

Judge Higginbotham's well reasoned opinion for a unanimous panel reached a fair and correct result. The essential problem that all of the forums, state and federal, addressed is whether the state should bear some of the burden for housing inmates they were refusing to accept. The response in every forum has been affirmative.

A further complicating factor is that petitioners do not operate these jails and any recommendations they might have changing operations would be merely advisory.

[4] Supreme Court Rules.

Petitioners' failure in federal court has been both consistent and frequent as demonstrated by a perusal of orders set out in the Petition's Appendices A - AA. Their losses in federal court were parallelled by those in state court. *County of Nueces v. Texas Board of Corrections,* No. 45,071 (Dist. Ct. of Travis County 250th Judicial Dist. of Texas); *Harris County v. State of Texas*, No. 465,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas). See County Respondents' Appendices A - H.

Even when the matter was taken to their own state legislature, petitioners' position was vanquished. Far from obtaining legislation which adopted petitioners' denial of financial responsibility, the Texas legislature in HB 93 required the state to pay the per diem cost of housing most state-ready inmates in local jails.

III. CONCLUSION

For the above reasons and those set out in the county respondents' opposition, review of the case should be denied and respondents request such other relief which the Court may deem just, fair and equitable.

RESPECTFULLY SUBMITTED,

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